make him answer to the said United States touching and concerning the premises aforesaid.

Charles M. Irelan, Attorney of the United States in and for the District of Columbia, by William W. Sewell, His said Assistant. (Seal.)

Personally appeared Hugh J. McGee before me this 7th day of October, A. D. 1952, and being duly sworn according to law, doth declare and say that the facts as set forth in the foregoing information are true.

William W. Sewell, Assistant Attorney of the United States in and for the District of Columbia.

[File endorsement omitted]

7/6 G-Jail 29
Bond L. W.

No. 500702

UNITED STATES, NB

vs.

FRANK LEWIS, 32 DeFrees St., N. W.

Occupational Tax Stamp Act.
Violation T 26 Sec 3290 U. S. Code
Atty Ehrlich

[fol. 3] WITNESSES:

John Lynch Bureau of Internal Rev.
Oct 7 1952. Cont. 10-31-52 Deft. Bond set at $500 JPC
Set for 1:30 pm. Mary C. Barlow Committed SFO
10/28/52 Motion to dismiss filed this date. Set 10-31-52.
Oct 31 1952. Cont. 11-12-52 Deft.

RGD TCS

Committed RE
Nov 12, 1952. Cont. 11-26-52 PM AJH Committed RE
Nov 26 1952 C 12-10-52 EHS AJH
Committed AR

Dec 10 1952. C 12-30-52 EHS reduced B 300 EHS AJH Committed RE

Dec 30, 1952. Cont. 1/30/53 Govt Committed RE FG MK

Jan 30 1953. Cont 6-3-53 Govt S Frank H. Myers Committed RE

May 7 1953. Motion to be heard May 22, 1953. TCS

Judge Scalley

May 21 1953. Brief for Deft submitted. Govt. to prepare brief to submit. C 6-5-53 JPC TCS

May 27 1953. Motion to extend time for filing of Govt. Brief extended to and including July 6, 1953 granted.

JMB TCS

July 6, 1953. Brief of Government filed of this date. TCS

Judge Scalley

7-24-53. Motion to dismiss granted.

JPC TCS

August 3, 1953. Notice of Appeal filed. ALC

August 7, 1953. Designation of Record and Statement of Errors filed. ALC

[fol. 4] August 13, 1953. Statement of Proceedings and Evidence filed and submitted to Trial Judge. WN

August 18, 1953. Agreed Statement of Proceedings and Evidence filed and submitted to Trial Judge. WN

August 19, 1953. Agreed Statement of Proceedings and Evidence approved by Trial Judge. WN

* * * * * * *

In The Municipal Court for the District of Columbia

Order Extending Time, Etc.—May 27, 1953

Upon consideration of the motion by the United States for an extension of time to and including July 6, 1953 within which to file its memorandum brief in opposition to motion to dismiss in the above entitled case, It is

Ordered that the motion be, and it is hereby, granted.

(Signed) Thomes C. Scalley, Judge.

* * * * * * *

In The Municipal Court for the District of Columbia

Motion to Dismiss Information—Filed October 28, 1952

The defendant moves that the information filed herein against him be dismissed on the following grounds:

1. Chapter 27a of the Revenue Act of 1951, upon which the information is based, is unconstitutional in that its provisions impose penalties upon the defendant in the guise of taxes.

2. Chapter 27a of the Revenue Act of 1951, upon which the information is based, contravenes the Fifth Amendment to the United States Constitution because the information required to be given by defendant in conformance with said Chapter compels defendant to be a witness against himself and to incriminate himself.

[fol. 5] 3. And for other reasons to be brought to the attention of the Court at this time this motion is argued.

(Signed) Myron G. Ehrlich, Attorney for Defendant, Columbian Building.

In The Municipal Court for the District of Columbia

Opinion

The issue raised by both the Motion to Dismiss and brief in support thereof filed herein and in argument before this

Court is the constitutionality of the occupational tax provisions of the Revenue Act of 1951 [1] which among other things levies a tax on persons engaged in the business of accepting wagers, requires such persons to register with the Collector of Internal Revenue (now Director of Internal Revenue) and contains certain "posting" provisions. The unconstitutionality of these provisions is asserted on three grounds.

First, it is urged that the provisions of Chapter 27A of the Internal Revenue Code contravene the Fifth Amendment in that compliance with said provisions compels a person within the District of Columbia to give information which will incriminate or tend to incriminate him of a violation or violati ns of Federal law, to wit, Sections 1501, 1502, 1503, 1508 of Title 22 of the District of Columbia Code and also Section 371 of Title 18, United States Code.

Secondly, it is urged that Chapter 27A imposes penalties in the guise of taxes, as evidence of the commission of a Federal crime, to wit, violation of any or all of the sections of the District of Columbia Code and United States Code hereinbefore cited, is first required before the tax can be imposed and, therefore, the tax constitutes a criminal sanction and is a penalty and not a true tax.

[fol. 6] Thirdly, it is urged that Chapter 27A of the Internal Revenue Code contravenes the Fourth Amendment in that compliance with its provisions, specifically Sections 3275 and 3293 of Title 26, U.S.C. illegally compels disclosures which could be used as a predicate for the issuance of a warrant resulting in an unlawful search and seizure.

The United States in opposing the defendant's Motion to Dismiss filed a memorandum brief in support of its position urging that the case of United States v. Kahringer, U.S. , decided March 9, 1953, is controlling.

At the outset I find that there can be no doubt that criminal laws enacted by the Congress of the United States with respect to criminal activities within the District of Colum-

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[1] 26 U. S. C. Sec. 3285, 3290, 3291, 3293, 3275.

bia are Federal laws [1] and this the United States necessarily so concedes.[2]

The defendant in this case is charged by information as follows:

> "Frank Lewis on December 13, 1951, and on diverse other days thereafter during the month of December 1951, in the District of Columbia *engaged in the business of accepting wagers, by reason of such activity he was required by law to pay the occupational tax (wagering) of $50.00 as imposed by Section 3290 of Internal Revenue Code,* he failed to pay said tax, all in violation of Section 3294(a) Internal Revenue Code; Title 26 in violation of Section 3294 (a) and Section 2707 (b) Internal Revenue Code as made applicable by Section 3294 (c) Internal Revenue Code." (Italics supplied)

The United States, by the charging provision of this information concedes what is obvious from a reading of Chapter 27A of the Internal Revenue Code and the provisions contained therein, to wit, that it is only by reason of the fact that the defendant engaged in the business of accepting [fol. 7] wagers that it charges he was required by Section 3290, Title 26 U. S. C. to pay the tax.

For the United States to prove that this defendant is guilty as charged in the information filed herein would require the United States to prove at trial not merely that this defendant failed to register pursuant to Section 3291 of Title 26, U.S.C. and pay the occupational tax imposed by Section 3290 of Title 26, U.S.C. but further and necessarily that subsequent to the enactment of Chapter 27A of the Internal Revenue Code he engaged in the business of accepting wagers in the District of Columbia. Such proof, however, would constitute proof of a violation or

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[1] *Arnstein* v. *U. S.*, 54 App. D. C. 199, 296 F. 946, Cert. denied 264 U. S. 595.

Story v. *Rives*, 97 F. 2d 182, Cert. denied 305 U. S. 595.

[2] Memorandum in Opposition to Defendant's Motion to Dismiss the Information, filed by the United States of America, July 6, 1953, page 13.

activity within the District of Columbia which requires registration and is taxed under the provisions of Chapter 27A. All persons in the District of Columbia engaged in those gambling activities covered by Chapter 27A can reasonably fear that compliance with its provisions will tend to or will, in fact, incriminate them of violations of Federal law.

Against, the difference in posture between the Kahringer case and the instant case is made more readily apparent by a fuller reading of the briefs filed by the United States in the Supreme Court. These briefs will disclose that they were devoted to the question of application of these taxes on wagering activities *in the states* with the exception of the discussion of the Federal lottery laws heretofore noted. The United States argued throughout for the constitutionality of Chapter 27A of the Internal Revenue Code on the ground that there is no doubt that federal taxes can be imposed on occupations *forbidden by state law. As a matter of fact the United States took the position that wagering is not unlawful under any federal law.* In its reply brief, the United States stated at page 2 thereof:

> [fol. 9] "We submit that the registration requirements of Sec. 3291 clearly do not violate the Fifth Amendment. In the first place, *the occupation taxes is unlawful only under state laws*, and the federal privilege against selfincrimination protects only against inquiries incriminatory under federal law . . ." (Italics supplied.)

Again, at page 3 of its reply brief the United States stated:

> "Section 3290 imposes a tax on the occupation of wagering. *Wagering is doubtless unlawful in many* states (perhaps in all but Nevada), but *it is not forbidden by any federal law.*
>
> "Thus, *the registration statement* in which the taxpayer is required to set forth his name, address and places of business, and the names and addresses of his agents or principals *does not call for a disclosure of information which will reveal a violation of federal law.*

"It is established that the self-incrimination clause of the Fifth Amendment only relates to information incriminatory under federal law . . ." (Italics supplied.)

That the Congress of the United States can enact legislation which is valid requiring registration and payment of excise taxes on various business activities which are legal in some states and illegal in others there can be no doubt. Such legislation has been sustained by the Supreme Court in many instances. Not only did the United States in its briefs in the Kahringer case, supra, cite those instances at great length but likewise did the Supreme Court rely on those same cases as corroborative of the power of Congress to so legislate.

I failed to find one single instance wherein the Supreme Court passed on any act of Congress which imposed a tax on an activity declared illegal by Congress and containing provisions for registration and payment of taxes which would compel a person engaged in such illegal activity to give answers which would tend to incriminate him. Nor has [fol. 10] the United States cited any such authority in the instant case. I may infer the reason for the lack of any such citation is that Congress has not passed any such tax legislation except the instant Act now being attacked.

The various cases cited by the United States in its briefs in the Kahringer case and cited with approval by the majority in its opinion therein, such as the License Tax cases, 5 Wall. 462; Nigro v. United States, 276 U.S. 332; United States v. Sonzinsky, 300 U.S. 506; United States v. Sanchez, 340 U.S. 42, and the remainder dealt solely with cases construing statutes imposing taxes and requiring registration by the person engaging in such activities, but in not one single instance can I find where Congress made any such activity unlawful if the tax was paid and the registration procedures complied with. Such is not the posture of the present case. Further, the United States in its reply brief at page 23 in the Kahringer case relied on several Prohibition Act cases and said:

". . . The cases sustaining the authority of Congress to impose taxes on occupations illegal under fed-

> eral law are especially significant in this connection. It was held in a number of cases that persons engaged in selling liquor during the period of national prohibition were still required to pay the federal taxes on the forbidden traffic. United States v. Stafoff, 260 U.S. 477, 480; United States v. One Ford Coupe, 272 U.S. 321, 327; United States v. Sullivan, 274 U.S. 259, 263."

But to the contrary, however, I find that those very cases support this defendant. The United States completely overlooked Section 35 of Title II of the National Prohibition Act which reads in part as follows:

> "*No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance,* but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with [fol. 11] an additional penalty of $500 on retail dealers and $1,000 on manufacturers." (italics supplied)

Accordingly, since no liquor revenue stamps or tax receipts for any illegal manufacture or sale were to be issued in advance, there was no requirement such as is present in the wagering tax law which compels a person to give evidence against himself in an endeavor to comply with its provisions.

An additional point which was strongly urged by the United States in its memorandum brief is that the wagering tax applies to future acts and not past acts and, therefore, the privilege against self-incrimination is not available and cites for its authority in support thereof that portion of the opinion of the Supreme Court in the Kahringer case which reads as follows:[1]

> "Assuming that respondent can raise the self-incrimination issue, that privilege has relation only to past acts, not to future acts that may or may not be committed, 8 Wigmore (3d ed., 1940) Sec. 2259(c). If respondent wishes to take wagers subject to excise

[1] Slip Opinion, page 10.

taxes under Sec. 3285, supra, he must pay an occupational tax and register. Under the registration provisions of the wagering tax, appellee is not compelled to confess to acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions."

Even if, for the sake of argument, it were to be admitted that this contention in general is sound, I feel it would fall in the District of Columbia by the virtue of the criminal sanctions that can be imposed under Section 371 of Title 18, U.S.C. For even assuming that the payment of the tax and registering would not compel a confession of past illegal substantive acts, nevertheless if two or more persons conspired to violate any of the anti-gambling provisions of the District of Columbia and in pursuance of that conspiracy one [fol. 12] of the conspirators applied for a tax stamp, such an act would be an overt act in furtherance of the conspiracy and sufficient to sustain a conviction. And I believe that even if Chapter 27A, supra, contained the words "before going into the business", which it does not, or if it incorporated by reference Section 3270 of Title 26, U. S. C. which will be discussed later, the foregoing examples would still apply.

However, I find that the United States' contention is neither supported by a review of Chapter 27A of the Internal Revenue Code nor the cases cited in support thereof. The foregoing quotation from the Supreme Court opinion is a paraphrase of language first appearing in the reply brief of the United States in the Kahringer case, supra, (pages 27 and 28) wherein the argument that the tax applies in future was first raised. However, the cases cited by the United States and also cited by the Supreme Court in its opinion, I believe, are not authority for that statement. The cases cited were Cf. Davis v. United States, 328 U.S. 582, 590; Shapiro v. United States, 335 U.S. 1, 35; E. Fougera & Co. v. City of New York, 224 N.Y. 269, 281, 210 N.E. 692.

In E. Fougera & Co., Inc. v. City of New York, supra, a city ordinance required dealers in patent medicines to reg-